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THE BOTSWANA COMPANIES ACT 2003**

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I hereby declare that i have read and understood the regulations governing the submission of minor dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this minor dissertation conforms to those regulations.

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Chapter One

Corporate Capacity and Authority of Agents under the Botswana Companies Act 2003

1.0 Introduction

The words of Professor Kahn Freund¹ in 67 years ago might still have the ring of truth in this era, thus,

‘Business organization is in a constant state of flux, and the law cannot hope to keep abreast of developments if it ascribes to its own provisions the quality of immortality. Other branches of commercial lawmay content themselves with setting up a stable framework and leave the function of adaptation to the contractual practice of the business community itself. Company law cannot afford to do this. As soon as the privileges of the corporate personality and limited liability have been made available to the business world, as soon as the handling of vast funds contributed by large and small investors has been entrusted to managers who are not subject to the law of loan and debt, the law must be alert to protect against the investor, the outside creditor, and the public itself. Company law cannot reach the stage of finality. it is in need of constant reform’

The passage by Botswana Parliament of the new Companies Act 32 of 2003 ushered in a new corporate era. The Act repealed the 1959 Companies Act which commentators had labeled as having lost touch with the modern trends of corporate matters.² The Bill was signed into law by the President on 2nd September 2004 and only came into operation on the 3rd July 2007.³ The coming into operation of the Act was delayed after its passage in parliament because of the drafting of its regulations. The country needed foreign direct investments hence a modern regulatory framework favourable to investors was therefore necessary. This new Act has indeed been welcomed and Botswana was ranked among the top fifteen foreign direct investment targets in Africa as of May

¹ O Kahn Freud, ‘company law reform’ (1946)9 *MLR*,235@235

² Kiggundu, ‘company law reform in Botswana; The agenda for the twenty first century’ (1996)117 *SALJ* 508. Professor Kiggundu also argued in the article that the Act needed a complete overhaul and that a piecemeal approach was not sufficient. He further outlined the areas in Botswana’s company law that needed reform.

³ Botswana Government Gazette, 12 April 2007

2012.⁴ The new companies Act has brought sweeping changes in the procedures involved in company formation and their classification. The major change which will be the focus of this paper relate to corporate capacity and the authority of its agents. It is important to highlight the fact that capacity and representation of a company are some of the vital concepts of company law as they define the interface with the outside world.⁵ Under the provisions of the old Act, the capacity of a company was limited to the activities expressly or impliedly authorised by its memorandum of association in the objects clause.⁶ The new act has incorporated a modern form of capacity, in which a company is a body corporate, with full powers which can only be limited by its constitution. The authority of agents of the company has also been reformed.

1.1 Research Question

The purpose of this paper is to examine the way in which the capacity of the company is to be determined and also how the law has been changed with regard to when the company acts beyond its capacity and where directors or other agents acts beyond their authority. Corporate capacity herein refers to the ability of a company to enter into a particular transaction with a third party and Authority on the other hand will refer 'to acts by individuals who purport to take decisions on behalf of the company.'⁷ The effectiveness of the Act in addressing the capability of the company to contract will be critically analysed and so are the protections offered to shareholders, the company and in equal measure third parties dealing with the company. The paper will particularly analyse

⁴ Mmegi online, business section Friday 11 May 2012, 1 issue: volume 29, 'Botswana attracted approximately US\$13,5 billion in foreign direct investment between 2003 and 2011. See also Professor Kiggundu's article 'modern company Law for the new Millennium: The Botswana Model' (2004) CILSA 101, where at he praised the Bill at page 130 saying, 'once enacted, it will ensure security of transactions, stimulate economic activity and attract further foreign investment. This will enhance Botswana's competitive advantage both regionally and internationally.'

⁵ PA Delpont 'companies Act 71 of 2008 and the Turquand rule' 2011 (74) *THRHR* 132

⁶ Section 8(ii) of the Act

⁷ AJ Boyle (consultant editor), *Boyle & Birds Company Law* 6ed (2007) 156; *British Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1985] 3 All ER 52

the two fundamental doctrines/rules relating to corporate capacity, namely the *ultra vires* doctrine and constructive notice. The *Turquand* rule, agency principles and constructive notice will be discussed in so far as they relate to authority of agents. A comparative analysis of the provisions of the Act on capacity and authority will be undertaken with reference to the South African Companies Act of 2008. The comparison is meant to assess the competitiveness and harmonization of the Act with those of other countries particularly in the SADC region, to foster regional integration.

1.2 Outline of the Paper

The first chapter is a general introduction followed by chapter two on the historical background of company law in Botswana and the position of the law regarding corporate capacity and authority of agents under the old Act. Chapter three will discuss the current position of the law, followed by a chapter on the remedies available in the Act to protect shareholders particularly those in the minority and third parties and comparison will be drawn with analogous provisions in the South African Companies Act of 2008. Lastly the paper will conclude with some recommendations for improvement of corporate law in Botswana.

1.3 Methodology

The research in respect of this paper is library based. It will involve analyzing the provisions of the 2003 Companies Act relating to corporate capacity and authority of agents. Textbooks and articles from journals and judicial decisions from comparative jurisdictions particularly those from the Commonwealth, will be considered in an attempt to find interpretations and applications to the provisions of the Act. A comparative analysis will be done with the South African Companies Act of 2008. Reference to the South African Act is motivated by the fact that it is a fellow regional

partner in SADC⁸ and an emerging economy like Botswana. Today there is a push for continental and regional integration. This integration cannot be achieved without the coming together of the laws of the region through harmonisation.⁹

⁸ The Southern African Development Community is a regional body founded in 1992 to foster regional integration among member states and ensure economic prosperity, peace and security. The 15 Member states are Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

⁹ See G Van Niekerk, 'Application of South African law in the Courts of Botswana' (2004) vol 37 *CILSA* 312@ 326 where the writer opines that, 'today there is a drive for unity within continents, not only in Europe, but also in Africa. Transnational economic advancement, collective self-reliance, as well as social upliftment are legitimate concerns in Africa. These goals cannot be realized without the coming together of the laws of the region through improved forms of legal interaction, legal cooperation and, ultimately, legal harmonisation.' Further see Van der Merwe, 'Economic Cooperation in Southern Africa: Structures, Policies, Problems' 1991 *CILSA* 386; Kliplagat "Jurisdictional Uncertainties and integration process in Africa: the need for harmony." 1995 *Tulane J of international and Comparative Law* 43.

Chapter Two

2.0 Historical development of company law in Botswana

To fully understand the present company legislation in Botswana, a brief background of the country's history is worth some discussion. Bechuanaland (the present day Botswana) was declared a British protectorate in 1885, following three Batswana chiefs visit to England to seek protection from the South African Boer encroachment.¹⁰ On the 10th June 1891 a proclamation was issued by the Queen in terms of which the law then applicable in the cape colony on the day was to apply *mutatis mutandis* in Bechuanaland Protectorate.¹¹ under the order, the high Commissioner was given power to exercise on Her Majesty's behalf all power and jurisdiction which Her Majesty had, or might have had, subject only to such instructions as he might from time to time receive from her Majesty. According to Nsereko,¹² the law then applicable in the British cape colony was Roman-Dutch law, which was a mixture of Roman-Dutch law principles brought by the Dutch settlers, and English law principles introduced by the British administration to govern those areas where Roman-Dutch law was either inadequate or non-existent. Kiggundu postulates that, 'companies and partnerships are not indigenous to Botswana. The law governing them is part of the received law and is very much based on English law'.¹³ The United Kingdom has been described as having 'a distinguished pedigree as an exporter of legal concepts and innovations',¹⁴ and more particularly to her former colonies and Botswana is no exception in this regard.

¹⁰ Ok Dingake, *key aspects of the constitutional law of Botswana* 1ed (1999)9

¹¹ See Bechuanaland Protectorate order in council of 9 May 1891

¹² DD Nsereko, *constitutional Law in Botswana* 1ed (2002)2. By the proclamation the Roman-Dutch law which was regarded as the basic law of the Cape Colony thus became the common law of Botswana and has continued to be so regarded till today. See also A. Aguda, 'Legal Development in Botswana from 1885 to 1966' (1973)5 *Botswana Notes and Records* 52-63, AJGM Sanders 'Constitutionalism in Botswana: A valiant attempt at Judicial activism' (1983) *CILSA* 351

¹³ J kiggundu, *company and partnership law in Botswana* 1ed(2000)55

¹⁴ BR Cheffins 'our common legal heritage: fragmentation renewal' (1999)30 *law Librarian* 4-5.

In 1959 the colonial government enacted the Companies Proclamation¹⁵ and when Botswana gained independence in 1966, the Proclamation was adopted as the Companies Act.¹⁶ The 1959 Act was based on the English Companies Act of 1948 and the Act was amended about 16 times in its 44 years of existence.¹⁷ The piecemeal amendments alluded to above were criticized by some commentators,¹⁸ who argued that a thorough overhaul of the Act was needed with a view to bringing a modernised Act. Cassim¹⁹ noted when commenting about the numerous amendments to the South African Companies Act of 1973 that, ‘this sort of patchwork and piecemeal reform has inevitably led to conflict in the policy and the objectives underpinning our company law regime’ words which applied equally to the amendments which had been done to the Botswana’s 1959 Companies Act. The old Act was not only anachronistic but also inadequate because it did not reflect Botswana’s current economic climate and aspirations. Most of its sections were obsolete, imposed time consuming company incorporation processes and proceedings, which were inconsistent with today’s international economic development trends such as globalisation and information technology advancements.

2.2 The Reasons for Reform

The government of Botswana in 1999 appointed Professor Peter McKenzie as a consultant to review the Companies Act. The consultant produced a Report and a draft Companies Bill, which were accepted by the government and the Companies Bill was published in 2001.²⁰ The new

¹⁵ Proclamation 71, 1959

¹⁶ Laws of Botswana chapter 42:01

¹⁷ The last amendment being in 1995. See Laws of the Republic of Botswana Act 7 of 1995.

¹⁸ Kiggundu op cit(n2)515

¹⁹ FHI Cassim ‘The companies Act 2008: An overview of a Few of its core Provisions’ (2010) *MERC LJ*157@157

²⁰ See PD McKenzie, *Final report on the Review of the Botswana Companies Act*(Gaborone, 1991), see also J kiggudu, ‘modern company Law for the New Millennium: the Botswana model’ in (2004)4 *ICCLJ* 101

Companies Act is based substantially on the New Zealand companies Act 1993.²¹ The Minister of Commerce and Industries, DR Margaret Nasha outlined the principles underlying the new Act, when introducing the Companies Bill in parliament on 9th December 2003, thus,

‘....Taking into account the constraints I have alluded to and the fact that company law is central to any country’s prosperity, it has become necessary to modernise our company incorporation regulatory framework. The modernization is primarily intended to enable us, as a country, to more competitively respond to challenges and opportunities in a fast changing and increasingly difficult environment in which we have to gainfully fend for ourselves if we are to avoid marginalisation within the interplay of globalized markets’.²²

The government’s vision to bring the country to a competitive advantage by modernising the Act has not been in vain, if recent reports by international reports are to be considered. Botswana has recently been ranked 74th in global competitiveness out of 148 economies worldwide.²³ One of the pillars of competitiveness is said to be ‘institutional environment, which is determined by the legal and administrative framework within which, firms and government interact to generate wealth.’²⁴ The importance of the Act in regard to the above cannot therefore be overemphasized. The

²¹ See J Kiggundu & Havenga ‘The regulation of directors’ self-serving conduct: perspectives from Botswana and South Africa’ (2004) *CILSA* 272@274. This is understandable given the fact that the principal consultant Professor McKenzie is from New Zealand.

²² National Assembly of Botswana Hansard number 143, part 5, Nov-Dec 2003

²³ The country has moved up five places taking fourth spot in Africa behind Mauritius, South Africa and Rwanda with a score of 4.13 in the 2012/2013 report. <http://www.mmegi.bw>, accessed on the 05/09/13. ‘The report assesses the ability of countries to provide high levels of prosperity to their citizens. Therefore, the global competitiveness index measures the set of institutions, policies, and factors that set the sustainable current and medium-term levels of economic prosperity’, <http://en.wikipedia.org> accessed on 10/09/13.

²⁴ The global competitiveness report 2012-2013, http://www3.weforum.org/docs/WEF_page_3, accessed on 10/09/13. The country has also been described in the following terms, ‘Botswana’s democracy is strong, stable and rooted in the rule of law. Botswana was widely regarded as one of the more effective countries in the world in combating corruption.....The prize committee believes that good governance requires an environment conducive to peace, security and development, based on the rule of law and respect for rights. Botswana has had to address the challenge of advancing each in a balanced way. This has been helped by independence and integrity of its institutions which bodes well for further progress towards spreading wealth and opportunity across all sectors of Botswana society.’ Press release, Mo Ibrahim Foundation, citation of the Prize Committee of the Mo Ibrahim Foundation (Oct. 20, 2008), available at <http://www.moibrahimfoundation.org/get/2009>,

minister also emphasized the aims of the Act in her introduction of the Bill in the August House as follows,²⁵

‘This bill seeks to reaffirm the value of company as a means of achieving economic and social benefits through aggregation of capital for productive purposes, spreading of economic risks, and taking of business risks. The Bill also seeks to do the following; define the relationship between directors, shareholders and creditors; provide basic and adaptable requirements for incorporation ,organization and operation of companies; encourage efficient and responsible management of companies by allowing directors wider discretion in matters of business judgment whilst at the same time providing protection for shareholders and creditors against abuse of management power; and finally provide straight forward and fair procedure for realizing and distributing the assets of insolvent companies.’

The above words of the minister were relevant when viewed against the backdrop of the corporate scandals which swept the world in 2002, the collapse of big companies in Enron, WorldCom and Parmalat. The statement by the minister was bold enough and was meant to show that the country was prepared to face the challenges of globalization and would not be left behind in statutory innovation. As company law commentators²⁶ have observed company law has a very important role to play in the economy and it is for this very reason that it has to be clear, certain and accessible. The Act has brought numerous innovations and amongst those, is the pressure it bears on company owners and directors to disclose shareholding structures, dividends and profits through its corporate governance aspect. As it has been said, disclosure is part of the heavy price the company has to pay to enjoy limited liability and that, ‘if a country does not have a reputation for a strong corporate governance practices, capital will flow elsewhere.’²⁷ The need for accurate financial reports and the credibility of external auditors in the modern business world cannot be overemphasized. They are indeed an integral part of managing any company. Part 13 of the Act is

²⁵ Ibid

²⁶ Cassim op cit (n16)157

²⁷ Words of Arthur Levitt, quoted in King II Report on Corporate Governance in South Africa, published by Institute of Directors In Southern Africa @10 Para 16

thus dedicated to providing comprehensive rules on reporting, accounting and disclosure.²⁸ These stringent requirements of reporting are meant for the protection of both shareholders and creditors against unfair dealing. The Act also strengthens the office of the Registrar of Companies²⁹ for the effective administration of companies and simplifies the formation of a company.³⁰ A company is no longer required to file the memorandum of association and articles as constitutive documents for registration. The company can choose to submit a constitution but is no requirement for company to have one.³¹ The Act also codifies the core legal duties of directors which is worth commendation as it brings simplicity and certainty in this area of our company law.³²

The focus of this paper is however, the changes brought about by the Act to corporate capacity and the authority of its agents, the issues the writer herein turns to, for a full discussion in the next chapter. It is however, important to discuss the position of the law under the previous Act with regard to both corporate capacity and authority of agents to fully appreciate the changes brought about the new Act.

2.3 Corporate capacity and Authority under the 1959 Act

²⁸ Sections 189-221 of the Act

²⁹ Section 10 creates a strengthened Registrar of Companies and outlines in detail his powers under section 14. The duties include the maintenance of a register of companies registered or deemed to be registered under the Act; external companies registered or deemed to be registered and dormant companies, returns for which have not been made for a period of five years. The Registrar also have the powers of inspection in which for purposes of ascertaining whether a company or an officer is complying with the Act or any subsidiary enactment made under the Act, he/she may, on giving 72 hours written notice to the company, call for the production of or inspect any book required to be kept by the company.

³⁰ Section 20 simplifies the registration process by providing for the formation of both public and private companies with one shareholder. A public company is required to be formed with at least two directors, while a private company needs only one director in terms of section 21. The Act provides for three types of companies being private, public and close companies.

³¹ Section 37 provides that, 'except where required by the any other Act, a company including a close company, but does not need to, have a constitution.' Where a company has a constitution, the company and its directors as well as its shareholders have the rights, powers, duties and obligations set out in the Companies Act except to the extent that they are excluded or modified in accordance with the Act by the Companies constitution. Where a public Company does not have a constitution, the Companies Act shall be its Constitution.

³² Section 130 deals with the duty of directors to act in good faith and the best interest of the company, section 40 deals with use of company information and section 143 is on disclosure of share dealing by directors.

Capacity of the company was generally governed by the objects clause, *ultra vires* rule and the constructive notice rule. Authority of agents to bind the company was on the other hand governed by the general agency principles coupled with the common-law doctrine of constructive notice and the *Turquand* rule. In this Chapter the three special rules, thus the *ultra vires* doctrine, constructive notice and the *Turquand* rule and their application to capacity and authority in the old dispensation shall be discussed.

2.3.1 The *ultra vires* Doctrine

Section 8(ii) of the Act required that the Memorandum of Association of each company state its objects. The objects clause specified the activities of which the company was formed to perform and this brought the application of the *ultra vires* rule into operation. Under the *ultra vires* doctrine a company was restricted from undertaking business activities that were not authorised, or incidental to, or consequential to its objects clause in the memorandum of association. The doctrine which has its origin in the common law³³ is to the effect that a company has no capacity to act beyond the scope of the objects stated in its memorandum and the purported transaction so concluded is null and void and not ratifiable even by the unanimous consent of its members. The capacity of a company is also linked to the authority of its agents. If a particular act of the company is *ultra vires*, it is by necessary implication outside the authority of its directors or agents. Moreover, since the objects clause appeared in a public document of the company, a third party was in terms of the doctrine of constructive notice deemed to have knowledge of it. The

³³ *Ashbury carriage and iron Co v Riche* (1875) LR 7 653, where the House of Lords led by Lord Cairns, explained it as follows, 'It was the intention of the Legislature, not implied, but actually expressed, that the Corporations, should not enter, having regard to this Memorandum of association, into a contract of this description. The contract in my Judgment could not have been ratified by the unanimous assent of the whole corporation.'

reasons for the doctrine as expounded in *Ashbury Railway* case,³⁴ was the protection of shareholders and creditors of the company. The other consequences of the doctrine were that the director who had acted on behalf of the company in the conclusion of an *ultra vires* transaction was liable to the company for breach of his fiduciary duty and further, that every shareholder was entitled to make an application to court restraining the company from entering into an *ultra vires* transactions and engaging in *ultra vires* activities,³⁵ the so called internal consequences of the rule. The rigours of this doctrine were not helped by the fact that section 10 of the Act restricted the alteration of objects clause of the company's memorandum of association except under the seven listed instances under section 11. The protections offered to shareholders and to companies by the rule were substantially dealt a blow in the twentieth century by strategies of widely drafted objects and powers clauses.³⁶ The doctrine became an unnecessary hurdle to doing business and new ways of protecting shareholders and creditors were devised and most countries jettisoned it or brought legislation to reform same. McLennan³⁷ has criticized the doctrine, saying 'the supposedly protection was illusory, and in practice, a prospective shareholder or creditor seldom, if ever, consulted a company's objects clause.'

2.3.2 Constructive Notice doctrine

Interlaced with the doctrine of *ultra vires* and also applicable to authority of directors is the common-law constructive notice doctrine, which was pronounced in the celebrated case of *Ernest*

³⁴ *Ashbury carriage and iron Co v Riche* (supra). However, opinion is divided as to whether third parties can plead *ultra vires* against the company. In *Bell Houses Ltd. V. City Wall Properties Ltd* [1966] All ER 674, the trial judge held that a third party could plead *ultra vires*. In New Zealand the court of Appeal held in *Cabaret Holdings v Meanee Sport and Rodeo club Inc.* [1982]1 NZLR 673, that a third party can plead *ultra vires*. In Australia the court has held that a third party cannot plead *ultra vires* against the company because the doctrine was meant for protection of the company, thus in *Re K.L Tractors Ltd.(in liquidation)* (1961) 106 CLR 318.

³⁵ Cassim op cit (16) 165

³⁶ Larelle Chapple, 'corporate Authority and dealings with officers And Agents' monograph 2002@ 54

³⁷ JS McLennan 'The *ultra vires* Doctrine and the Turquand Rule in Company Law; a suggested solution'(1979)*SALJ* 329@331

v Nicholls in 1857,³⁸ which expounded that a person dealing with a company is deemed to be fully acquainted with the company's public documents which included, its memorandum of association, articles of association and resolutions that were in the office of the registrar of companies. The effect of this doctrine is that no person can seek to enforce against a company, a transaction or contract which is beyond the company's capacity or the authority of its directors by taking refuge into ignorance of the limitations placed on the company's capacity by its objects clause or the lack of authority of its directors as imposed by its memorandum and articles of association respectively. The authority of directors in the old Act was contained in the articles of association whilst the memorandum governed the relationship of the company with the outside world. The memorandum contained the name, domicile, objects, status and capital structure of the company.³⁹ In accordance with section 17 of the Companies Act of 1959, every company was obliged to deliver for filing with the Registrar of companies, copies of its memorandum, articles and special resolutions, which made them public documents, available for inspection by members of the public, which is the pinnacle of the doctrine. The doctrine was thus relevant in respect of both capacity and authority. This doctrine just like the *ultra vires* rule has fallen out of favour with time. It has been criticized as being harsh and outmoded⁴⁰ given the modern way of conducting business. Many countries reformed this harsh rule with a statutory constructive notice and Botswana was thus left behind with this relic rule.

2.4 Authority of agents and the Turquand rule

³⁸ (1857)6 HL CAS 401 and was explained by Lord Heatherely in *Mahony v East Holyford Mining co.* in the following passage, 'the memorandum and articles are open to all who are minded to have any dealings whatsoever with the company and those who so deal with them must be affected with notice of all that is contained in those documents.,

³⁹ See (n12)100

⁴⁰ Kiggundu, 'Company law reform in Botswana; The agenda for the twenty-first century (1996)117 SALJ 508 at 510

A company being an inanimate creature can only act through human intervention; however those acting on its behalf should have authority in order for their acts to bind it. The basis for the powers of company agents could either be actual or ostensible authority,⁴¹ and that's what prevailed under the 1959 Companies Act in Botswana. The scope of authority of directors or other agents of the company was determined by the provisions of the memorandum of association and the articles. The directors could exercise on behalf of the company such powers as expressly conferred or those powers which are fairly incidental to the exercise of those powers.⁴² In the previous Act the power to delegate was only available if expressly provided for under the articles of association. Ostensible authority(also known as agency by estoppel) ensues 'by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority.'⁴³ The third party's constructive knowledge of the company's memorandum of association and articles was presumed to preclude him from enforcing the transaction concluded between him and the company in excess of the director's authority which subject to the possibility of ratification was completely void. The severe effects of the constructive notice doctrine were mitigated by the common law rule laid down in the leading case of *Royal British Bank v Turquand*.⁴⁴ The *Turquand* rule also known as (the indoor management rule) is generally pronounced by saying that, 'persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been duly performed and are not bound to enquire whether acts of internal management have been regularised.'⁴⁵ It is generally concerned with the limitations on the authority of directors or other representatives of the company to

⁴¹ AJ Boyle, *company Law* 6ed(2007) 188

⁴² C Baxter 'ultra vires and Agency untwined'(1970) *Cambridge law Journal* 280 @ 282

⁴³ *Freeman & Lockyer* [1964]2 QB 480,at 503,per Diplock LJ.

⁴⁴ (1856)119 ER 886

⁴⁵ Dictum of Lord Simons in *Morris v Kanssen* 1946 AC 459 at 474

contract on its behalf as stipulated in its memorandum of association.⁴⁶ The rule was developed by the courts to mitigate the cruel effects of the constructive notice doctrine and minimize the risk of unenforceability of contracts for the outsider. It had proved to be a valuable principle as it complemented the general law of agency to resolve the issues of authority of company representatives. Cassim⁴⁷ mentions that, 'the *Turquand* rule is justified on the basis of business convenience. Business dealings with a company would be very difficult, if not hazardous, if third parties were required to inquire into the internal affairs of the company.' Lord Simmons echoed the same sentiments in the case of *Morris v Kanssen*⁴⁸, where he said, 'the wheels of business will not go smoothly round unless it may be assumed that, that is in order which appears to be in order.' The rule is only available to protect bona fide third parties who are not aware of the internal irregularities or did not suspect such an irregularity⁴⁹ and is therefore not available to insiders such as directors and shareholders.⁵⁰ An outsider, who had knowledge which gives him suspicion to inquire about the internal management of the company, cannot claim benefit of the rule. Another exception to the *Turquand* rule under the common law is that it is not available to third parties who rely on a forged document and seek to hold the company liable.⁵¹

⁴⁶ The cases decided on the basis of this rule have generally involved the following scenarios, thus, the defective appointment of a director, or a director continuing to act for a company after he has ceased to be a director, failure to hold a properly convened board meeting to authorize the company to enter into a transaction and a disregard of the limitations imposed on the authority of directors by the memorandum of association

⁴⁷ FHL Cassim (Managing Ed) *contemporary Company Law* 2ed (2012) 181

⁴⁸ *Morris v kanssen* supra (n26)

⁴⁹ *Mine workers union v Prinsloo* 1948 (3) SA 831 (A)

⁵⁰ Per Lord Simonds in *kanseen* case in regard to directors, he said, 'to admit in their favour a presumption that that is rightly done which they themselves have wrongly done is to encourage ignorance and careless dereliction from duty.' The protection is not completely out of reach to insiders as there are instances where they can seek such as illustrated in the case of *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549

⁵¹ *Ruben v Great Fingall consolidated* [1946] AC 439 (HL)

Chapter Three

3.0 Corporate capacity and authority of agents under the Companies Act 2003

As alluded to above the new Act has brought some changes to corporate capacity and authority. The Act has specifically jettisoned some old doctrines, reformed others in an attempt to resolve the problems of corporate capacity and agency. Part III of the Act is dedicated to dealing with capacity, powers and validity of a company's actions.

The Act provides that unless the constitution of the company contains a provision limiting its powers a company has full capacity to carry on or undertake any business or activity, do any act or transaction and for that purpose shall have full rights, powers and privileges,⁵² unlike in the old Act wherein the powers of a company were limited to its main object clause in the Memorandum of association. The provision fell short of granting a company as a juristic person, the full powers, rights and privileges of a natural person, a different move, if comparison is drawn to trends adopted by other Commonwealth jurisdictions such as Australia, Canada and South Africa.⁵³ Section 25(2) provides that a company may make provision in its constitution limiting its capacity, rights, powers and privileges.

3.1 Consequences of limiting the company's capacity

⁵² Section 25(1)(a) and (b) provides that 'subject to this Act, any other enactment, and the general law, a company has, both within and outside Botswana, - (a) full capacity to carry on or undertake any business or activity, do any act which it may by law do, or enter into any transaction; and (b) for the purpose of paragraph (a), full powers and privileges.

⁵³ See the Australian Corporations Act 2001 under section 124(1) provides that a company has the legal capacity and powers of a natural person notwithstanding any restrictions or prohibitions on the exercise of its memorandum of association and so is section 15(l) of the Canadian Business Corporations Act which provides that a corporation has the capacity and subject to the Act, the rights, powers and privileges of a natural person. The South African Act in section 19(1)(b) provides that the company has all the powers and capacity of an individual, except to the extent that a juristic person is incapable of exercising any such power, or having any such capacity; or the company's memorandum of incorporation provides otherwise.

Under the Act⁵⁴ a company is at liberty to set out its objects in its constitution which shall have the effect of limiting its capacity and powers to do only those activities which are stated therein, and any action outside the stated objects will be *ultra vires* and also beyond the company's representative's powers unless the constitution provides otherwise. Moreover, the limitations imposed by the constitution of the company are valid in as far as they do not conflict with the Act.⁵⁵ For the convenience of discussion, the provisions of section 26 will be set out hereunder, thus,

26. Validity of actions

- (1) If the constitution of a company sets out the objects of a company, there is deemed to be a restriction in the constitution on carrying on any business or activity that is not within those objects, unless the constitution provides otherwise
- (2) If the constitution of a company provides for any restriction on the business or activities in which the company may engage-
 - (a) the capacity and powers of the company shall not be affected by that restriction; and
 - (b) And no act of the company and no contract or other obligation entered into by the company and no transfer of property to or by the company is invalid by reason only that it was done in contravention of that restriction.'

From the aforementioned section it is clear that despite the fact that a company can limit its capacity in its constitution, any acts of the company which are outside the scope of such limitation are not null and void. The Companies Act now provides that the restriction imposed on the company in its constitution would not render the contract or activity invalid as was the case in the old Act of 1959. Under the new Act the contract so entered into by the company remains valid and enforceable as between the company and all other parties to the contract. The company cannot be heard to say that the contract is beyond its powers or those of its directors hence unenforceable

⁵⁴ Section 25(2)

⁵⁵ Section 42(1) provides that the constitution of a company has no effect to the extent that it contravenes, or is inconsistent with this Act.

against the company. The provisions of section 26 thus partially abolish the doctrine of *ultra vires*, which is the external consequence which rendered actions of the company null and void because there were beyond its capacity. The internal consequence of the doctrine is preserved by the Act thus, the company is entitled to sue each director who exceeded his/her authority by entering into the contract for breach of his/her fiduciary duty and the shareholders rights to bring an action against the company restraining it from doing anything which contravene its constitution.⁵⁶ The right to bring a restraining action against the company is also extended to an “entitled person”⁵⁷ which is a new concept in company law in Botswana. It is also easy for the company to alter or revoke its constitution⁵⁸ unlike under the old Act wherein alteration of the objects was restricted to the seven specified instances under section 11(1) (b).⁵⁹ The Act does not provide for the ratification of an *ultra vires* transaction by the company, it does however provide for ratification⁶⁰ of powers exercised by directors or the board of the company which power is vested on shareholders or any other person. The ratification or approval by the shareholders or the other person of the unlawfully exercised power by the director or board in question, is deemed to be, and always to have been, a proper and valid exercise of that power,⁶¹ thus it has a retrospective effect.

⁵⁶ Section 26(3) provides that subsection (2) does not limit the – (a) section 165, relating to interdicts to restrain conduct by a company that would contravene its constitution; (b) section 166 relating to derivative actions by directors and shareholders; (c) section 170 relating to actions by shareholders of a company against the directors

⁵⁷ Defined under section 2 as a shareholder or a person upon whom the constitution confers any of the rights and powers of a shareholder.

⁵⁸ Under Section 43(2) the shareholders may by a special resolution alter or revoke its constitution and equally shareholders of a company which does not have a constitution may by special resolution adopt a constitution for the company.

⁵⁹ Under section 11(1)(b) of the old Act the company could only alter the provisions relating to the objects of the company in the following instances thus, to carry on its business more economically or more efficiently, to attain its main purpose by new or improved means, to enlarge or change the local area of its operations, to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company, to restrict or abandon any of the objects specified in the memorandum, to sell or dispose of the whole or any part of the undertakings of the company, or to amalgamate with any other company or body of persons.

⁶⁰ Section 176(1) provides that, ‘the purported exercise by a director or the board of a company of a power vested in the shareholders or any other person maybe ratified or approved by those shareholders or that person in the same manner in which the power may be exercised.’

⁶¹ Section 176(2)

It is however submitted that the power of shareholders under the common law to ratify by special resolution actions by directors which are inconsistent with a limitation imposed by the constitution has not been abolished by the Companies Act of 2003. This view is based on the presumption in our law that a statute is not to be taken to alter the general law unless it uses words which point unmistakably to that conclusion.⁶²

In contrast the South African Act expressly provides that shareholders may by special resolution ratify⁶³ any action of the company or that of directors that are inconsistent with any limitation, restriction or qualification imposed by the memorandum of Incorporation and such shall have retrospective effect; however an action in contravention of the Companies Act cannot be ratified.⁶⁴ The South African Act also protects *bona fide* third parties who obtain the rights in good faith and without actual knowledge of the particular limit, restriction or qualification imposed in the capacity of the company or the authority of its agents by giving them the right to claim for damages.⁶⁵ This section is laudable in that it seeks to strike a balance between the interests of the company and the rights of third parties under a transaction which is not consistent with the memorandum of the company.⁶⁶ A company can thus avoid the complexities of the internal consequences of the ultra vires rule as per section 26 by simply not limiting its powers or those of the directors in its constitution. The *ultra vires* rule, still remain (despite the reforms which were long overdue) an important part of our law for the protection of both shareholders and creditors.

⁶² See EK Quansah *Introduction to the Botswana Legal System* 1ed(1993)58, see also the persuasive South African decision of *Casserley v Stubbs* 1916 TPD 310 at 312, where Wessels J said 'it is a well-known canon of construction that we cannot infer that a statute intends to alter the common law. The statute must either explicitly say that it is the intention of the legislature to alter the common law, or the inference from the ordinance must be such that we can come to no other conclusion that the legislature did have such an intention.'

⁶³ Section 20(2)

⁶⁴ Section 20(3)

⁶⁵ Section 20(5)

⁶⁶ See(n42) 177

The Act has brought new remedies to further protect shareholders, particularly the minority shareholders, which shall be a subject of chapter four of this paper.

3.2 The Act and the doctrine of Constructive notice

The doctrine of constructive notice has been expressly abolished⁶⁷ by the Companies Act of 2003. Third parties dealing with the company are no longer presumed to be aware of the limitations on the company's capacity or director's authority solely because the company's public documents are available for inspection at the Registrar of Companies office. This simply means that a company can no longer rely on any limitation on its powers or limitation of authority imposed on the agents of the company by the constitution against an outsider or third party to seek to avoid enforcement of a contract or transaction on grounds that he/she should have known of such. The abandonment of this doctrine is in keeping with development of company law in other common law jurisdictions like South Africa,⁶⁸ New Zealand,⁶⁹ and Australia⁷⁰ who have done away or reformed it with some statutory provisions. The South African Act however creates an exception under section 19(5), wherein a third party is presumed to have notice and knowledge of special conditions stated in the company's memorandum of incorporation if his attention has been drawn to such by the inclusion of the suffix 'RF' in the company's name as per section 11(3)(b).

The minister of commerce and industry, Dr Nasha in her explanatory remarks on the bill to parliament, had occasion to state the following in relation to this doctrine, thus,

⁶⁷ Section 28 provides that, 'no person shall be deemed to have notice or knowledge of the contents of the constitution of, or any other document relating to, a company by reason only of the fact that the constitution or document has been registered by the registrar; or it is available for inspection at the office of the company'.

⁶⁸ Section 19(4) which provides that 'subject to subsection (5), a person must not be regarded as having received notice or knowledge of the contents of any document relating to a company merely because the document- (a) has been filed; or (b) is accessible for inspection at an office of the company.

⁶⁹ Section 19 of the companies Act 1993

⁷⁰ Section 130 provides that 'a person is not taken to have information about a company merely because the information is available to the public from ASIC.'

`the bill also abolish the ultra vires and constructive doctrines.....with respect to constructive notice doctrine, the current law places the onus on third parties to have knowledge of the memorandum and articles of association, resolutions and notices of companies. Given today's world, most business activities are conducted through the telephone, telefax, e-mail, internet and other electronic means. It is unfair to expect third parties within and outside this country to examine the companies registered documents. The abolition of the constructive notice doctrine is therefore, intended to give greater security to third parties in their dealings with companies.'⁷¹

The doctrine of constructive notice had acted as a great impediment for third parties to do business with the company particularly in the modern times as the minister had said above.

3.3 Authority of agents under the Act

Section 127 places the management of the business and affairs of the company under the board of the company. The board is in this regard clothed with all the powers necessary for managing, directing and supervising the management of the business and affairs of the company subject only to the limitations imposed by the Act or the company's constitution.⁷² The board of the company is also given the authority to delegate one or more of its powers to a committee of directors, a director or employee of the company or any other person except those powers listed in the third schedule of the Act.⁷³ The Board however, remains responsible for the exercise of the power by the delegate as if the power had been exercised by the board.⁷⁴ Previously the power to delegate

⁷¹ See note 15

⁷² Section 127(3)

⁷³ Section 129.the board however cannot delegate the following powers; to issue shares under section 50; the consideration of the issue of shares under section 53; power relating to distributions under section 58;issue of shares in lieu of dividends in section 61; shareholder discounts under section 62; offers to acquire shares under section 66; redemption of shares at the option of the company under section 73;provision of financial assistance under section 76; change of registered office in section 184; the manner of approving an amalgamation proposal in section 224 and short form of amalgamations in section 225.

⁷⁴ Section 129(2), provides for exceptions where the board, (a) believed on reasonable grounds at all times before the exercise of the power that the delegate would exercise the power in conformity with the duties imposed on

was permitted by the articles of association and they could be no delegation without express authority from the articles.⁷⁵ The principles of agency law will thus continue to operate to determine the authority of agents to bind the company, and so is the *Turquand* rule. Section 27 of the Act also regulates the dealings between the company and other persons by making certain rebuttable presumptions. The section codifies some common-law principles of agency and the *Turquand* rule. The *Turquand* rule which is aimed at the protection of third parties to assume that the company has complied with its internal formalities and procedures as laid down in the memorandum and articles of association unless the third party knew for a fact that these internal formalities and procedures had not been complied with or where he had suspected that they were not complied with but had deliberately and wilfully shut his eyes to the irregularity.⁷⁶ It is a rule of procedural convenience for the outsider and complimented the application of agency rules in resolving issues of authority of company agents. Some common law rules of agency have also been codified as well. Section 27 of the Act is set out hereunder in extenso for the convenience of discussion, thus,

27. Dealings between company and other persons

- (1) a company or guarantor of an obligation of a company may not assert against a person dealing with the company or with a person who has acquired property, rights, or interests from the company that-
 - (a) This Act (in so far as it provides for matters of company meetings and internal procedure) or the constitution of the company has not been complied with; or
 - (b) A person named as a director or secretary of the company in the most recent notice received by the registrar under section 155-
 - (i) Is not a director or secretary of a company,
 - (ii) Has not been duly appointed, or

directors of the company by this Act and the company's constitution; (b) has monitored, by means of reasonable methods properly used, the exercise of the power by the delegate.

⁷⁵ See *Cartmell's case; Re county Palatine loan & Discount Co.* (1874) LR 9 CH APP 691

⁷⁶ D Davies (managing editor) *companies and other business structures in South Africa* 1ed (2009) 42

(iii) Does not have authority to exercise a power which a director or secretary of a company carrying on business of the kind carried on by the company customarily has authority to exercise;

(c) A person held out by the company as director , secretary, employee, or agent of the company

(i) has not been duly appointed, or

(ii) does not have authority to exercise a power which a director, secretary, employee, or agent of a company carrying on business of the kind carried on by the company does not customarily have authority to exercise, does not have authority to exercise that power; or

(d) a person held out by the company as a director, secretary, employee or agent of the company with authority to exercise a power which a director, secretary, employee, or agent of a company carrying on business of the kind carried on by the company does not customarily have authority to exercise, does not have authority to exercise that power; or

(e) a document issued on behalf of the company by director , secretary, employee or agent of the company with actual or usual authority to issue the document is not valid or not genuine, unless the person has, or ought to have, by virtue of his position with or relationship to the company, knowledge of the matters referred to in any of the paragraphs (a),(b),(c),(d), or (e), as the case maybe, of this subsection and in that case subsection (3) applies

(2) subsection (1) of this section applies even though a person of the kind referred to in paragraphs (b) to (e) of that subsection acts fraudulently or forges a document that appears to have been signed on behalf of the company, unless the person dealing with the company or with a person who has acquired property, rights, or interest from the company has actual knowledge of the fraud or forgery

(3) where the person dealing with the company has, by virtue of his position with or relationship with the company, knowledge of any matters referred to in paragraphs (a), (b), (c), (d), or (e) of subsection (1), the company shall not be precluded from asserting against that person that the state of the particular matter of which that person has knowledge in fact accords with the knowledge of that person'

The Act now does provide that a person dealing with the company is entitled to assume that the company has complied with the internal requirements as provided by the Act itself and/or the constitution of the company unless the person has, or ought by virtue of his position with or relationship with the company knowledge that there has been non- compliance. The above is a restatement of the common law Turquand rule with some modifications. The protection is lost where the third party knew or ought to have known, of the lack of authority or compliance thereof. The provision also bars the company from assenting against a third party that one of the directors,

employees or agents did not have authority to enter into a transaction on behalf of the company unless the third party knew, or ought to have known, of that lack of authority. The above provision is couched in the same fashion as section 18 of the New Zealand Companies Act.⁷⁷ It is also apparent that just like the common law *turquand* rule; the statutory provision does seem not to protect insiders such as directors, shareholders and employees as by virtue of their position with or relationship with the company they ought to know of non-compliance with the internal requirements and formalities by the company. The provision is thus the statutory restatement of the common law *Turquand* rule, and as already alluded to with some modifications which should be expected of a modern Act, the modifications are discussed below. The South African Companies Act in section 20(7) as read with section 20(8), creates a statutory *Turquand* rule and simultaneously preserves the *Turquand* common law rule. I shall hereunder attempt to bring out the changes that had been brought about by the provisions of section 27 to the common law in relation to the authority of directors and the *Turquand* rule.

Firstly, the statutory *Turquand* rule as appear in section 27(1)(a) seem to apply to preclude the company from asserting against third parties in instances where the internal procedures and formalities as laid down by the Act had not been complied with. On the strength of two South African cases,⁷⁸ the common law *Turquand* rule does not operate to favour a third party where the internal formality or requirement transgressed is provided for by the Act. However the South African companies act 2008 provide expressly⁷⁹ that the *Turquand* rule does apply to statutory

⁷⁷ Act no 105 of 1993.

⁷⁸ *Farren v Sun Service SA Photo Trip Management (Pty)Ltd* 2004 (2) SA 146 and *Stand 242 Hendrik Potgieter Road Rumimg v Gobel* NO 2011 (5) SA 1, where the court dealt with the application of the *Turquand* rule to section 228 which required a resolution by a general meeting in disposing a substantial or whole of the company's assets. The court held that a third party could not assume that a disposal by a company under section 228 had been approved and therefore seek the protection of the *turquand* rule.

⁷⁹ Section 20(7) provides that ' a person dealing with a company in good faith' other than a director , prescribed officer or shareholder of the company, is entitled to presume that the company, in making any decision in the

requirements. This is particularly relevant in relation to section 128(1) the Botswana Companies Act which provides that a company shall not enter into a major transaction or make a substantial gift⁸⁰ unless the same has been sanctioned by a special resolution.⁸¹ A “major transaction” is one involving the purchase or disposition of assets which are more than half the of the company’s assets.⁸² The application of the *Turquand* rule in this case to protect third parties at the expense of shareholders is not particularly helpful to Botswana as a developing economy with a sizeable proportion of the population being illiterate. As Lewis JA eloquently explained, ‘it would be cold comfort to a shareholder, when the company loses its substratum to be told to sue the directors who have acted without approval.’⁸³ The drafters of the Act have succumbed to one of the dangers of borrowing from other jurisdictions, thus, slavish coping, which ignores the level of economic development and historical context of the country.

Secondly, the common-law *Turquand* rule does not apply to forgeries,⁸⁴ however, under the statutory innovation; the rule is extended to cover forgeries and acts of fraud, unless the third party had actual knowledge of the forgery or fraud.⁸⁵ Under the statutory *Turquand* rule a third party can rely on a forged document or acts of fraud which induced him /her to enter into a transaction

exercise of its powers, has complied with all of the formal and procedural requirements in terms of this Act, its memorandum of incorporation and the rules of the company unless, in the circumstances, the person knew or reasonably ought to have known of any failure by the company to comply with any such requirement.’

⁸⁰ Substantial gift is defined under section 128(2) as ‘the making by a company voluntary contributions to any charitable or other fund, other than a pension fund for the benefit of employees of the company or a related corporation, of any amounts which, in any financial year, will in the aggregate exceed P100, 000, or two per cent of the net profits of the company for the last preceding financial year, whichever is the lesser.’

⁸¹ Major transaction and substantial gift are defined under section 128(2) of the Act

⁸² Section 128(2)

⁸³ *Stand 242 Hendric Potgieter Road Rumisig*(supra) @ 5F

⁸⁴ *Ruben v Great Fingall Consolidated* [1906] AC 439 (HL), where Lord Loreburn opined as follows. ‘I cannot see upon what principle your lordships can hold that the defendants are liable in this action. The forged certificate is a pure nullity. It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management, and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery.’

⁸⁵ See section 27(2)

with the company. Thus a company cannot escape liability for a false document where the issuing director, secretary, employee, or agent was authorized to issue a true document unless the third party knew or ought to have known of the forgery thereof.⁸⁶ This is in stark contrast with the common-law *Turquand* rule and its consequences can be far reaching because a forgery or fraud can never be justified under any circumstances. However, the extension of the rule to forgeries and acts of fraud is justified given the globalised ways of doing business, wherein it would be cumbersome for the third party to always seek to verify the documents by the company before conducting business with the company.⁸⁷

Thirdly, as stated by Professor Jooste,⁸⁸ in terms of the common law, a person dealing with the managing director of a company can assume that authority has been delegated to the managing director if such delegation is possible in terms of the company's constitution. However, if in terms of the company's constitution, authority to act on behalf of the company can be delegated to an ordinary director, a third party dealing with the director cannot, generally, relying on the *turquand* rule, assume that the internal requirement of delegation has taken place.'

In reading of section 27(1)(c) of the Act, one is led to conclude that, a third party in the instance mentioned by Professor Jooste above, will be entitled to seek protection under the *Turquand* rule. This view is strengthened by section 129 which provides that subject to the restrictions in the company's constitution the board may delegate to a director of the company or more so any other person, any or more of its powers except those specifically excluded.

⁸⁶ Section 27(1)(e)

⁸⁷ T Cain in his article, 'The rule in *British Bank v Turquand* in 1989' (1989)1 *Bond Law Review* 272@ 274, justified a similar provision in the Australian Corporations Act, thus 'at the back of the rule is a question of policy as to who should run the risk of loss from unauthorized acts purporting to be done on behalf of companies. The rule demonstrates that *Prima facie*, losses should be borne by companies and not by outsiders, and courts should not be astute.'

⁸⁸ R Jooste 'Observations on the Impact of the 2008 companies Act on the Doctrine of Constructive Notice and the *Turquand* rule' (2013)113(3)*SALJ* 464@470

Section 27(b) cited above appears to give protection to outsiders dealing with a director or secretary of the company who has not been validly appointed. A third party is entitled to deal with a director or secretary and such dealings are valid, if the names of the director or secretary have been published as such in the recent notice received by the Registrar.⁸⁹ The Company is bound by the notification and is estopped from denying liability, as the third party is entitled to rely on the statement of fact. In this respect it is necessary that the third party should have inspected the notification in order to seek reliance. The third party will only lose protection if he knew or ought to have known of the invalid appointment. Section 27(b) not only states the common law position, that protection of a person dealing with the company under the indoor management rule is not affected merely because the director or secretary has not been properly appointed, but also avoids the decision of the House of Lords in *Morris v Kanssen*,⁹⁰ which validated the acts of a person where there was a defective appointment of him as a director, but said it did not apply where there was no appointment at all. This section is further buttressed by section 154 which provides that the acts of a director are valid notwithstanding his defective appointment or lack of qualification thereof.

The Act also codifies the common law principle of ostensible authority or agency by estoppel,⁹¹ as enunciated in the case of *Freeman & Lockyer v Buckhurst Park Properties Ltd.*⁹² In this regard, where a director, secretary, employee or agent of the company who has no actual or prior authorisation, enters into a transaction with a third party, such a transaction is binding on the company, if such director, secretary or employee had been held out by the company as having

⁸⁹ Section 155 provides for notification of directors and Secretary to the office of the Registrar

⁹⁰ Cited supra(note 38)

⁹¹ Section 27(1)(c)

⁹² [1946]1 All ER 630

authority to conclude such a transaction.⁹³ This provision is particularly important in relation to the position of company secretary,⁹⁴ which is a must have for every company in terms of section 161 except for a close company and as has been held a company secretary is no longer a mere clerk, but a chief administrative officer of the company.⁹⁵ In respect of the estoppel doctrine, it is important to highlight the difference of its application in the South African jurisdiction, wherein it cannot operate to allow a contravention of a statute.⁹⁶

Another issue with regard to section 27, is whether or not the protection offered thereunder is entirely out of reach for insiders such as directors, shareholders and employees, as it provides that protection therein will be lost if the person ‘by virtue of his position with or relationship to the company, knowledge’ of the non-compliance with any of the matters referred in paragraphs (a)-(e). The common law *Turquand* law does not entirely exclude protection of insiders and the decision of *Hely-Hutchinson v Brayhead Ltd*⁹⁷ is the case on point. The import of this decision is that where a director of a company makes a contract with the company in a capacity other than that of a director he/she is entitled to protection of the *Turquand* rule. It is submitted that to interpret section 27 as

⁹³ Section 27(1)(c)

⁹⁴ The duties of a company secretary include preparation of all returns required to be filed with Registrar of Companies, issuing all notices of meeting and responding to all enquiries in relation to notices of meetings, attending meetings of directors and general meetings of shareholders and keeping minutes of those meetings, to be responsible to the board for maintaining the register of shareholders and other holders of securities of the company, ensuring together with the directors that the company keeps accounting records and that annual financial statements are prepared and presented at the annual meeting and also responsible to the board for maintaining an adequate system of record keeping in relations to the correspondence, affairs and activities of the company.

⁹⁵ Per Lord Denning In *Panorama Development (Guildford) Ltd V Fedelis Furnishing Fabrics Ltd* [1974]3 All ER 16 where he said, ‘but times have changed. A company secretary is a much more important person nowadays than he was in 1887. He is an officer of the company with extensive duties and responsibilities. This appears not only in the modern Companies Act, but also by the role which he plays in the day-to-day business of companies. He is no longer a mere clerk.....All such matters now come within the ostensible authority of a company secretary.’

⁹⁶ See *Eastern Cape Provincial Government v Contractprops 25(Pty) Ltd* 2001(1) SA 142 paras 11-12 and also *City of Tshwane Metropolitan Municipality v RPM Bricks (PTY) Ltd* 2008(3) SA 1 at paragraph 13 where Ponnar JA opined that, ‘failure by a statutory body to comply with provisions which the legislature has prescribed for the validity of a specified transaction cannot be remedied by estoppel because that would give validity to a transaction which is unlawful and therefore *ultra vires*.’

⁹⁷ [1968]1 QB 549

totally excluding insiders from protection in instances where they are plainly “outsiders” would have very far reaching results on the ordinary day-to-day business transactions as it ‘would or might involve very often considerable inquiry before a contract could be signed as to what the respective position and authority was of a particular individual by whom it was proposed that a contract should be signed’⁹⁸ which is doubtful was the intention of Parliament. The New Zealand court⁹⁹ held (interpreting a similar provision) that, [Relationship] extends to a class of persons outside the insiders of the company but does not limit it to those with an ongoing relationship with the company. The New Zealand court rejected the view taken by the Australian courts in *Lyford v Media Portfolio Ltd*,¹⁰⁰ that relationship meant “legal or non-arm’s length connection” such as the relationship to the company of directors, shareholders and employees. The writer hereof supports the interpretation proffered by the New Zealand court. Similar sentiments have been expressed by Professor Jooste¹⁰¹ in his analysis of section 20(7) of the South African companies Act which expressly exclude directors, shareholders and prescribed officers from the protection of the statutory *Turquand* rule.

In summing up this part of the discussion it would do no harm in citing the dictum of Wood J when dealing with section 164 of the Australian corporations Act (the equivalent of section 27), where he stated as follows,

‘that section 164 was enacted, inter alia, to clarify and codify the indoor management rule ,developed from the decision in *Royal British Bank v Turquand* ;to overcome the distinction drawn in *Morris Kanseen*.....between defective appointments and non-existent appointments; to overcome

⁹⁸ Per Roskill J in *Hely-Hutchinson* (supra)@ 567

⁹⁹ *Equipticorp Industries Group Ltd V A-G* [1998]2 NZLR 481@ 722

¹⁰⁰ (1989)7 ACLC 271@281

¹⁰¹ See note(73)2471 ‘it is highly questionable that the legislature has seen fit to deprive insiders of the protection afforded to outsiders when there are clearly circumstances where the vulnerability of insiders is equal to that of outsiders’

the view arising out of *Ruben v Great Fingall Consolidated*.....that the indoor management rule cannot assist in the case of forgery, and to codify the rule in *Howard v Patent Ivory Manufacturing Co*.....to the effect that a third party could not take advantage of the indoor management rule if had notice, actual or constructive that the person with whom he was dealing with lacked the authority of the company',¹⁰²

The above dictum apply with equal force the reasoning behind the enactment of section 27 of the Botswana companies Act, which was to correct the confusion in application created by the common law and clarify the law for business efficacy.

¹⁰² *Barclays Finance Holdings V Sturges & others* (1985)3 ACLC 662@667

Chapter Four

4.0 Shareholders Remedies under the Act

This chapter is concerned with the remedies available to shareholders to protect their interest and that of the company in instances where the capacity of the company has been exceeded or its representatives acted without authority. In the 1959 Act there were few statutory remedies to protect shareholders and protection was largely left only to the common law. Under the common law a shareholder seeking to bring an action on behalf of the company was sometimes confronted with the rigid procedural difficulties laid down in the case of *Foss v Harbottle*.¹⁰³ The reform of the ultra vires rule and the jettisoning of the constructive notice doctrine which for a long time protected the interest of the company and the shareholders from abuse by the directors and the controlling shareholders, meant that new and effective remedies had to be introduced in the Act. The provision of effective statutory remedies enhances private enforcement of shareholders rights hence reducing reliance upon criminal sanctions, which have proved inadequate to deal with problems arising in companies. The remedies available to shareholders wherein the provisions of the company's constitution or the Act have been violated appear under Part eleven of the Act and are discussed hereunder.

4.1 Interdict

A Shareholder of the company may bring an action against the company to restrain the company or its director from engaging in conduct that contravene its constitution or the Act.¹⁰⁴ The constitution takes effect in law as a contract between not only the shareholders and the company, but between

¹⁰³ See note 53

¹⁰⁴ Section 165(5) provides that, 'the court may on an application under this section, make an order restraining a company that, or a director of a company who, proposes to engage in conduct that would contravene the constitution of the company or this Act, from engaging in that conduct'.

each individual shareholder and every other. This right of shareholders to interdict the company arises out of contract between the company and shareholders. Under section 165 shareholders can make an application to the High court to interdict the company from acting *ultra vires* the constitution where the constitution imposes a limitation on the powers of the company or the authority of its directors. Shareholders may also apply for an interdict where the company or the directors engage in a conduct prohibited by the companies Act and the right has been extended to entitled person,¹⁰⁵ the company and a director. The court in hearing an application under section 165(1) can make such consequential relief as it considers appropriate in the circumstances of the case, however the conduct complained of must not have been completed.¹⁰⁶ The need for this remedy has become far greater than in the past since the company will now be liable on an *ultra vires* contract once it is concluded. Under the old Act it was not as important as now because an *ultra vires* transaction was null and void. The remedy has been in existence under the common law and now it has been codified and an order to interdict can only be made in relation to a conduct or course of conduct that has not been completed.

In South Africa, shareholders have a statutory right as well to restrain the company from contravening any provision of the Act¹⁰⁷ or restrain the company or its directors from doing anything which is inconsistent with any limitation, restriction or qualification of the powers of the company or the authority of its directors as imposed by the memorandum of incorporation.¹⁰⁸

4.2 The statutory derivative Action

¹⁰⁵ Defined under section 2 as a person upon whom the constitution confers any of the rights and powers of a shareholder

¹⁰⁶ See section 165(4)

¹⁰⁷ Section 20(4)

¹⁰⁸ Section 20(5)

Under the common law, it is trite law that the company is the proper plaintiff in a case for a redress for a wrong committed against it.¹⁰⁹ The rule also known as the ‘proper plaintiff rule’ underlines the principle of separate legal existence of a company from its members and the law allowed that, the will of the majority is to be identified with that of the company. The rights to enforce a wrong committed against a company lie only at the instance of the company because it is a legal persona separate from its members. As Schreiner¹¹⁰ properly put it, ‘in effect the decision to bring a suit lies in the first instance in the hands of the directors, and in the second, in the hands of a majority of shareholders in a general meeting.’ The justification for the rule has been that it limits the multiplicity of suits by individual shareholders and secondly that it promote shareholders democracy and this was succinctly stated in *Sammel v President Brand Gold Mining Co. Ltd.*¹¹¹ It is only in exceptional circumstances where a member or members could be given the *locus standi* to institute an action on behalf of the company.¹¹² The common law derivative action was the only route available particularly to minority shareholders where those in control of the company were reluctant to launch an action for the company or where those in control were the wrongdoers hence blocked the institution of proceedings by the company.¹¹³ A shareholder seeking to bring a derivative action under the common law was confronted with two major hurdles; firstly, that all the

¹⁰⁹ *Foss v Harbottle* supra (n56). The exceptions under which the rule will not apply had traditionally been divided into the following four categories, thus, (i) personal actions (ii) actions relating to ultra vires /illegal transactions (iii) actions relating to transactions which require a special majority and (iv) actions relating to transactions which constitute a fraud on the minority.

¹¹⁰ O schreiner, ‘the shareholder’s derivative Action- A comparative study of procedures’ (1979)96 *SALJ* 211

¹¹¹ 1969(3) SA 629@ 678 where the court stated, ‘By becoming a member a shareholder in a company a person undertakes.... to be bound by the decisions of the prescribed majority of the shareholders, if those decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affect his own rights as a shareholder.’

¹¹² The rule does not extend to cases where the act complained of is either illegal or is a fraud on the minority or where it is oppressive to the minority

¹¹³ ‘it can be forcefully argued that the exceptional situations grounding a derivative suit, as enumerated in *Foss v Harbottle*, are too narrow, with the result that much managerial misconduct escapes uncensored; and that too much faith has been placed over the years in democratic control.’ Schreiner op cit(n61)211

documents and records which he/she must rely on to prove his case are under the control of the directors who happen to be defendants. Secondly the shareholder is faced with the prospect of being saddled with heavy legal costs should he not succeed in his application, despite the fact that he/she was not suing on his own interest but that of the company.

The 2003 Companies Act has ushered in a new statutory derivative action, which expressly abolishes¹¹⁴ the common law right of a person other than a company to bring an action on behalf of the company. Section 166(1) extends the right to bring proceedings in the name and on behalf of the company or any of its subsidiaries or to intervene in proceedings to which the company or any related company is party for purposes of continuing, defending or discontinuing the proceedings on behalf of the company or subsidiary, as the case maybe, to a shareholder, director and an entitled person with leave of the High court by simply serving a notice of the application for leave on the company or subsidiary.¹¹⁵ The company or related company may appear and be heard and shall inform the court whether or not it intends to bring, continue, defend or discontinue the proceedings, as the case may be.¹¹⁶ The modernisation of this action demonstrates the lost faith in shareholders democracy to protect the interest of companies in the wake of the corporate scandals that occurred in the turn of the 21st century. The Act further sets out the criteria to assist the court in exercising its discretion whether or not to grant leave to bring proceedings sought.¹¹⁷ In

¹¹⁴ Section 166(6) provides that 'except as provided in this section, a shareholder or entitled person or director of a company is not entitled to bring or intervene in any proceedings in the name of, or on behalf of, a company or subsidiary.

¹¹⁵ Section 166(4)

¹¹⁶ Section 166(5)

¹¹⁷ Section 166(3) provides that 'leave to bring proceedings or intervene in proceedings may be granted under subsection (1) , only if the court is satisfied that either- (a) the company or related company does not intend to bring, diligently continue or defend, or discontinue the proceedings, as the case maybe; or (b) it is in the interest of the company or subsidiary that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders as a whole.' In determining these the court would have to take into account, the likelihood of the proceedings succeeding, the costs of the proceedings in relation to the relief likely to be obtained, the action already taken by the company or subsidiary to obtain relief and the interests of the

determining whether to grant leave the court must have regard to the likelihood of the success of the proceedings, the costs of the proceedings in relation to the relief likely to be given, any action already taken by the company or the subsidiary to obtain relief and the interests of the company or the subsidiary in the proceedings being commenced, continued, defended, or discontinued. The guidelines set are to guard against vexatious and baseless applications. The statutory derivative action thus makes it easier for shareholders to bring directors to book in cases where they have exceeded their powers in acting for the company as a result of which the company suffered damages. The action so instituted is not for the benefit of the individual shareholder but that of the company, the shareholder's benefit from the suit is only indirect. The modern derivative action under section 166 gives the court the power to make an order which it deems fit in the circumstances of the case. Under section 168, where the application is upheld, the court may give directions as to the conduct of the proceedings and/or make an order requiring the company or directors to provide information in relation to the proceedings. This has brought the much needed relief to shareholders because under the common law derivative action it was difficult if not impossible to bring proceedings because the much needed information was in the hands of the directors who also happened to be defendants and discovery of documents followed the ordinary procedures.

The other advantage offered by the statutory derivative action relates to payment of costs of the suit, wherein the court may order the whole or part of the reasonable costs of bringing or intervening in the proceedings be borne by the company unless it considers the same to be unjust and inequitable for the company to bear costs.¹¹⁸ This is a welcome relief, for under the common

company or subsidiary in the proceedings being commenced, continued, defended, or discontinued as the case maybe.

¹¹⁸ Section 167

law a shareholder could personally incur a heavy legal bill on his/her bid to protect the company's interest and this provision acknowledges the dictum of Lord Denning MR in *Wallersteiner v Moir*¹¹⁹ where he said in regard to costs in derivative action, thus,

"assuming that.....bringing the action...was a reasonable and prudent course to take in the interest of the company.....the company itself should be liable for the costs of the real defendants because the plaintiff was acting for it and not for himself. In addition, he should be himself be indemnifiedin respect of his own costs. It is a well-known maxim of law that he who would take the benefit of a venture if it succeeds ought also to bear the burden if it fails"

The statutory derivative action in the South African Act¹²⁰ is available to a wider class of applicants and its use is not limited to wrongs that are just committed by the management or the controllers of the company.¹²¹ It is available to registered shareholders or a person entitled to be registered as a shareholder of the company or related company, a director or prescribed officer of the company or a related company, or a registered trade union representing employees of the company or another employee representative, or a person who has been granted leave by the court. The common-law derivative action just like in Botswana has also been abolished¹²² by the 2008 Act. In this respect the South African derivative action offers more protection than its Botswana counterpart; however in both jurisdictions the court plays a pivotal role in the application of this remedy.

4.3 Action by Shareholders against Directors

It is a well-established principle under the common law that directors owe fiduciary duties to the company¹²³ and not to individual shareholders or the company's creditors. The director can be held personally liable to the company (but not generally to its shareholders) for his acts while

¹¹⁹ [1975] QB 37 at 391-392

¹²⁰ Section 165

¹²¹ See MF Cassim, 'statutory Derivative action under the Companies Act of 2008' (2013)130 SALJ 496@500

¹²² Section 165(1) which provides that, 'any right at common law of a person other than a company to bring or prosecute any legal proceedings on behalf of that company is abolished, and the rights in this section are in substitution for any such abolished right.'

¹²³ *Percival v wright* [1902]2 Ch 421

performing his role as director but shareholders have no direct right of action against such a director.

Under the companies Act 2003, there are some duties which a director specifically owes to individual shareholders of which breach will attract a personal action against the director by shareholders. Section 170(1) of the Act gives each individual shareholder of a company the right to bring an action for damages or loss against a director for breach of a duty owed to him as a shareholder. The Act entrusts the management of the business and affairs of the company under the direction and supervision of the board of directors.¹²⁴ The duties owed by directors specifically to individual shareholders include, compliance with the Act or the constitution of the company by directors in exercising their powers,¹²⁵ the use or disclosure of confidential company information otherwise than as permitted under the Act,¹²⁶ disclosure of interest¹²⁷ and disclosure of share dealings.¹²⁸ Of relevance to this paper is therefore that shareholders can sue directors for causing the company to do anything inconsistent with its constitution, however this will only be possible where the actions by the director has not been ratified by a special resolution by the company. In proceedings instituted by a shareholder against a director(s) under section 170(1), the court may appoint that shareholder to represent all or some of the shareholders having the same or substantially the same interest in the subject matter of the action.¹²⁹ This is meant to curtail opening of a floodgate of suits by each injured shareholder against the director leading to endless proceedings.

¹²⁴ Section 127(1)

¹²⁵ Section 130(1)(a)

¹²⁶ Section 130(1)(i)

¹²⁷ Section 135

¹²⁸ Section 143

¹²⁹ Section 173

In south Africa, each shareholder has in terms of section 20(6), a claim for damages against any person who intentionally, fraudulently or due to gross negligence causes the company to do anything that is inconsistent with the Act or anything inconsistent with a limitation on the capacity of the company or its directors authority unless ratified by a special resolution. An action in contravention of the Act is however not ratifiable.¹³⁰ It is apparent that the claim for damages by shareholders under the South African Act is much wider as it is not limited only to directors. In South Africa Shareholders can also apply to court to have a director declared a delinquent director or placed under probation.¹³¹ This is a very drastic remedy which i submit has a very deterrent effect and will keep directors on their toes to always act in the best interest of the company.

4.4 Actions by shareholders against the Company

The common law shareholder's personal action against the company has been codified by the 2003 Companies Act. A shareholder now has a statutory right to bring an action against the company for a breach of a duty owed to him by the company.¹³² The shareholder thus brings the action in his capacity as member of the company and not on a representative capacity for the company. Pennington¹³³ points out that, 'the individual rights of a member arise in part from the contract between the company and himself which is implied on his becoming a member and in part from the general law.' A shareholders as a member of the company is does entitled to a number of rights which include amongst others, voting at meetings of the company on any resolution; an equal share in dividends authorized by the board and to an equal share in the distribution of the surplus assets of the company.¹³⁴ A shareholder is also entitled to pre-emptive rights to new shares¹³⁵ and

¹³⁰ Section 20(3)

¹³¹ Section 162(2)

¹³² Section 171

¹³³ RR Pennington, *Pennington's Company law* 7ed (1995)866

¹³⁴ Section 45(2)

to having his name and shareholding entered in the share register.¹³⁶ A shareholder may therefore bring an action against the company if any of his rights adumbrated have been infringed upon and the shareholder can also sue on a representative capacity under section 173 where there are numerous shareholders having the same or substantially the same interest in the subject matter of the action before court. In South Africa this remedy has not been codified, hence the common-law personal action by shareholders against the company is still available. There is an interesting provision in the South African Act, which entitles third parties to damages in instances where they have obtained rights from an ultra vires contract in good faith and without actual knowledge of the particular limit, restriction or qualification in the memorandum of Incorporation.¹³⁷ The Botswana Companies Act is silent on the rights of third parties to sue hence the position of the common law will still apply.

4.5 Prejudiced shareholder's remedy

The Companies Act provides a remedy for a shareholder where a company's affairs are being, or have been or where there are likely to be conducted in a manner which is oppressive, unfairly discriminatory or prejudicial to him/her as a shareholder.¹³⁸ The shareholder can also bring an application where an act or acts of the company are likely to be oppressive or unfairly discriminatory or prejudicial to him. The proceedings are brought by way of an application and the applicant has to prove on a balance of probabilities the allegedly prejudicial or oppressive conduct. The remedy is also available to former shareholders and to any other entitled person. The statutory oppressive remedy under the 1959 companies Act¹³⁹ was criticized for its shortcomings

¹³⁵ Section 52

¹³⁶ Section 85

¹³⁷ Section 20(5)

¹³⁸ Section 174

¹³⁹ Section 164(1)

by some commentators.¹⁴⁰ The court will only give relief or order in the application under section 174(1) if it considers that it is just and equitable to do so in the circumstances of the case.¹⁴¹ The orders the court may make are wide and some drastic, particularly the one putting the company into liquidation. The other orders the court may pronounce include, requiring the company to pay compensation to a person, regulating the future conduct of the company's affairs, altering or adding to the company's constitution and directing the rectification of the records of the company. No order can be made against the company or any other person unless the company or that person is party to the proceedings in which the application is made.¹⁴² This remedy is laudable; in that it is couched in a fairly wide manner hence it is friendlier to minority shareholders.

The relief from oppressive or prejudicial conduct in South Africa is provided for under section 163 of the Act and it has been extended to directors. The section is also couched in more simple terms being, 'oppressive, or unfairly prejudicial to, or that disregards the interests of' as grounds for application of the remedy, in similar fashion with section 241 of the Canadian Business Corporations Act of 1985.

4.6 Appraisal Rights

Provision is made under the companies Act for a dissenting shareholder to be bought out at a fair and reasonable price if he/she votes against a decision made by the company to alter the constitution in order to impose or remove a restriction on the business or activities of the company

¹⁴⁰ J kiggundu 'company law: 'some interesting Aspects in Botswana' *Commonwealth law Bulletin* (1989)15 1524-32, where he argued that the word "oppression" was not defined in the Act and that from the few decided cases it was not easy to prove oppression. He further argued that the remedy was tied to other statutory remedies in that the section required the petitioner to show in addition to oppression that the facts justified a winding up order on the just and equitable ground and judicial management.

¹⁴¹ Section 174(2)

¹⁴² Section 174(3)

or to approve amalgamation or a major transaction.¹⁴³ In the context of this paper the relevant ground upon which a shareholder can seek a buy-out will be where the company has passed a resolution to alter the constitution in order to impose or remove a restriction on the business or activities of the company. This is so, because the removal or imposition of such a restriction has an impact on the capacity of the company. It is submitted that this option of buy-out will only be possible in companies having constitutional restrictions in their activities as per section 25(2) of the Companies Act. If the shareholder wants to be bought out he/she must give the company written notice within ten days after the resolution to alter the constitution or to approve an amalgamation or a major transaction has been passed.¹⁴⁴ The company is then required within twenty working days, to either agree to purchase the shares¹⁴⁵ or arrange for some other person to purchase same¹⁴⁶ or apply for an exemption order under section under sections 102 or 103. The company can be exempted from purchasing the shares where the purchase will be disproportionately damaging to the company or the company cannot reasonably be required to buy the shares or is unjust and inequitable for the company to purchase the shares.¹⁴⁷ The company can also be exempted from purchasing the disgruntled shareholder out where it is insolvent.¹⁴⁸ This relief is very much welcome as it gives flexibility to those who are against the new direction that the company might be venturing into, and avoids protraction between shareholders and the Board. The remedy also protects the interest of the majority by expediting corporate transactions. In south Africa the remedy is under section 164 and is triggered by a proposal by the company to pass a

¹⁴³ Companies Act section 96(1) as read with section 98(i)(a). section 98 provides that, 'shareholders may require company to purchase shares, where (a) a shareholder is entitled to vote on the exercise of one or more of the powers set out in- (i) section 96(1)(a), and the proposed alteration imposes or removes a restriction on the business or activities in which the company may engage.'

¹⁴⁴ Section 99

¹⁴⁵ Section 99(2)(a)

¹⁴⁶ Section 99(2)(b)

¹⁴⁷ Section 102

¹⁴⁸ Section 103

special resolution for purposes of either engaging in one of the three fundamental transactions¹⁴⁹ or to amend its memorandum of incorporation by altering the preferences, rights, limitations or other terms of any class of its shares in any manner materially adverse to the rights or interests of holders of that class of shares as contemplated in section 37(8). Although new in both of Botswana and the South African statutes, appraisal rights have been in existence in other Jurisdictions like the United States of America and New Zealand.¹⁵⁰

¹⁴⁹ Fundamental transactions include disposal of all or the greater part of the assets of the company under section 112; amalgamation or merger in section 113 and; proposal for scheme of arrangement in section 114.

¹⁵⁰ See SJ Pain 'Achieving the proper Remedy For dissenting Shareholder in Today's Economy;Yuseph v Kosch' winter 2005(vol. 62) Louisiana Law Review 911

Chapter Five

5.0 Conclusion and Recommendations

The 2003 Companies Act has abolished and simultaneously codified some common law rules relating to both corporate capacity and authority of a company. The provisions of the Act have attempted to strike a balance between the company, its shareholders and directors and third parties in abolishing the common law doctrines of *Ultra vires* and constructive notice. In this respect the Act has succeeded in improving business convenience and leveling the field of play between the company and third parties dealing with the company. The codification and modification of the common law *Turquand* rule has to some extent offered more protection to third parties at the expense of shareholders as discussed in chapter three and in this respect it needs to be re-looked at by Parliament. The Act offers more and effective remedies to shareholders than its predecessor. The introductions of new remedies such as the appraisal rights to dissenting shareholders as well as the streamlined derivative action are very much welcomed. Effective shareholders remedies enhance private enforcement of rights and reduce reliance on criminal sanctions.

The Act also compares well with its South African counterpart in relation to corporate capacity and authority of agents. The South African Act however, offers better protection because its remedies are widely framed and extended to other stakeholders like employees and trade unions. In this modern corporate world companies are not only responsible to shareholders but to a number of stakeholders hence Botswana Companies Act has fallen short in this regard. In the end I agree with the words of Professor Kahn Freund quoted at the beginning of this paper that company law can never reach a stage of finality. It must be reformed constantly in order to keep abreast of developments and thus be relevant. Parliament as the repository of the will of the people is

therefore duty bound to constantly review the companies Act to realign it with the changing dynamics in the world.

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